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**THE DEATH OF DISCOUNT ONLINE RETAILING? RESALE PRICE  
MAINTENANCE AFTER *LEEGIN V. PSKS***

***Erich M. Fabricius***<sup>1</sup>

*In Leegin Creative Leather Products, Inc v. PSKS, Inc., the Supreme Court announced a shift in the law of minimum resale price maintenance by overruling the longstanding per se prohibition of these policies. The new rule of reason standard is more permissive of these minimum resale price maintenance agreements and as a result their use is likely to increase. Increased use of minimum resale price maintenance would harm online discounters competing for customers primarily on the basis of price. Nevertheless, it remains to be seen how many manufacturers will actually implement these policies, as there are both practical and economic disincentives to implementation.*

**I. INTRODUCTION**

Online retailing is a fast growing sector of the United States economy, with online retail sales growing an average of 27.3% per year from 2000 to 2005, compared to 4.3% per year for the overall retail industry.<sup>2</sup> A number of factors drive e-commerce, such as convenience and information availability,<sup>3</sup> but a highly efficient pricing market that often delivers lower prices than traditional

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<sup>2</sup> U.S. CENSUS BUREAU, E-STATS 3 (2007), <http://www.census.gov/eos/www/2005/2005reportfinal.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>3</sup> Toñita Perea y Monsuwé, Benedict G.C. Dellaert & Ko de Ruyter, *What Drives Consumers To Shop Online? A Literature Review*, 15 INT'L J. SERVICE INDUSTRY MGMT. 102, 116 (2004) (listing several factors motivating consumers to shop online); Mary Wolfinbarger & Mary C. Gilly, *Shopping Online for Freedom, Control, and Fun*, CAL. MGMT. REV., Winter 2001, at 34, 35 (attributes of goal-oriented shoppers).

stores is a particular strength of e-commerce.<sup>4</sup> Online stores have been able to compete vigorously amongst themselves based on price,<sup>5</sup> aided by legal rules prohibiting restrictions on their ability to set prices freely.

Since online retailing began, minimum resale price maintenance agreements prohibiting retailers from selling a product below a given price have been considered illegal per se under *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*<sup>6</sup> Under this per se approach, no circumstances exist that would justify these types of agreements.<sup>7</sup> While certain tactics gave suppliers limited control over retail prices,<sup>8</sup> the legal risk associated with those tactics prevented widespread use.<sup>9</sup> The absence of minimum

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<sup>4</sup> See Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 MGMT. SCI. 563, 564–65 (2000).

<sup>5</sup> Yannis Bakos, *The Emerging Landscape for Retail E-Commerce*, J. ECON. PERSP., Winter 2001, at 69, 71 (noting “that on-line markets will have more intense price competition, resulting in lower profits as well as the passing to consumers of savings from lower cost structures”). But cf. Fabio Ancarani & Venkatesh Shankar, *Price Levels and Price Dispersion Within and Across Multiple Retailer Types: Further Evidence and Extension*, 32 J. ACAD. MARKETING SCI. 176, 185 (2004) (observing lower posted prices online but seeing signs of non-price differentiation).

<sup>6</sup> 220 U.S. 373, 409 (1911); see *infra* text accompanying notes 32–36.

<sup>7</sup> See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (noting the per se rule required the exclusion of evidence pricing policies had procompetitive effects).

<sup>8</sup> See *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (establishing the permissibility of unilateral price agreements, where a supplier announces a minimum price without seeking agreement from retailers, and enforces the price by discontinuing dealing with non-complying retailers); see also *infra* text accompanying notes 37–40.

<sup>9</sup> See, e.g., Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59, 91 n.76 (1994) (noting the limits of the *Colgate* rule’s value); Brief of PING, Inc. as Amicus Curiae in Support of Petitioner at 9–10, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 173680 [hereinafter PING Brief] (describing great efforts undertaken to minimize risk a pricing policy could be found bilateral).

resale price maintenance has aided the growth of discount retailing in the last twenty-five years.<sup>10</sup>

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>11</sup> the Supreme Court held that minimum resale price maintenance agreements should be evaluated for anticompetitive effects under a rule of reason standard instead of the prior standard of per se illegality.<sup>12</sup> The rule of reason standard is more permissive than its predecessor, and the *Leegin* Court makes it clear that circumstances can exist that would justify use of minimum resale price maintenance agreements.<sup>13</sup> The Court's acceptance of these agreements could result in discount online retailers losing their essential ability to compete based on price.<sup>14</sup> Yet, even though online retailers will more likely be impacted by resale price maintenance agreements under the new standard, there is no reason to conclude these agreements will become widespread in the marketplace.<sup>15</sup>

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<sup>10</sup> See Susan Strasser, *Woolworth to Wal-Mart: Mass Merchandising and the Changing Culture of Consumption*, in *WAL-MART: THE FACE OF TWENTY-FIRST CENTURY CAPITALISM* 31, 49 (Nelson Lichtenstein ed., 2006) (noting that increased legal hostility towards resale price maintenance in the 1970s "legitimized the pricing practices of Wal-Mart and other discount stores and was essential to their further expansion").

<sup>11</sup> 127 S. Ct. 2705 (2007).

<sup>12</sup> *Id.* at 2710.

<sup>13</sup> *Id.* at 2715–20; see *infra* notes 65–82 and accompanying text.

<sup>14</sup> See *infra* notes 123–24 and accompanying text. Following *Leegin*, consumer groups have indicated concern over pricing online. See, e.g., *Supreme Court Lets Manufacturers Set Minimum Prices*, CONSUMERREPORTS.ORG, July 2007, [http://www.consumerreports.org/cro/money/news/2007/07/supreme-court-lets-manufacturers-set-minimum-prices/overview/0807\\_supreme\\_court\\_decision\\_ov.htm](http://www.consumerreports.org/cro/money/news/2007/07/supreme-court-lets-manufacturers-set-minimum-prices/overview/0807_supreme_court_decision_ov.htm) (on file with the North Carolina Journal of Law & Technology). Members of Congress have also raised alarm, introducing a bill on October 30, 2007, to overturn the *Leegin* decision. See 153 CONG. REC. S13582–S13583 (daily ed. Oct. 30, 2007) (statement of Sen. Kohl) (explaining need to overturn *Leegin* in that "millions of consumers have benefited from an explosion of retail competition from new large discounters . . . on the Internet"). The bill as introduced, S. 2261, would amend the Sherman Act by expressly banning vertical agreements setting minimum prices. Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007).

<sup>15</sup> See discussion *infra* Part III.B.

## II. BACKGROUND

### A. Leegin: *Ordinary Dispute and Doctrinal Shift*

*Leegin* was brought as a private antitrust suit alleging resale price maintenance in violation of § 1 of the Sherman Act under the *Dr. Miles* per se rule.<sup>16</sup> This type of suit is relatively common under this body of law.<sup>17</sup> The defendant, Leegin Creative Leather Products, Inc. (“Leegin”) produces premium leather goods under the “Brighton” brand name.<sup>18</sup> Leegin requires its retailers to sell at or above a particular minimum retail price as a condition of continued wholesale purchasing.<sup>19</sup> Retail stores operated by PSKS, Inc. (“PSKS”) began discounting below these prices, and Leegin refused to supply its goods to PSKS because they refused to stop discounting.<sup>20</sup> At trial, Leegin defended its minimum retail price practice by defining it as a unilateral policy, permitted under the *Colgate* doctrine,<sup>21</sup> as opposed to a bilateral agreement.<sup>22</sup> However, the jury found Leegin’s pricing plan to be in fact a bilateral agreement, so the *Colgate* unilateral pricing exception offered Leegin no protection from the *Dr. Miles* rule of per se

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<sup>16</sup> *Leegin*, 127 S. Ct. at 2712.

<sup>17</sup> Brief for Anderson Economic Group, L.L.C. as Amicus Curiae Supporting Respondent at 7, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 621852 [hereinafter Anderson Economic Group Brief] (noting “[m]any RPM cases . . . are brought by private parties”). See generally Roger D. Blair, Jill Boylston Herndon & John E. Lopatka, *Resale Price Maintenance and the Private Antitrust Plaintiff*, 83 WASH. U. L.Q. 657 (2005) (discussing private antitrust suits in the realm of resale price maintenance).

<sup>18</sup> *Leegin*, 127 S. Ct. at 2710.

<sup>19</sup> *Id.* at 2711 (describing Leegin’s “Brighton Retail Pricing and Promotion Policy”).

<sup>20</sup> *Id.*

<sup>21</sup> See *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (recognizing that right of manufacturers to choose whom to deal with allowed them to stop selling to retailers not heeding their price recommendations); see also *infra* notes 37–40 and accompanying text.

<sup>22</sup> *Leegin*, 127 S. Ct. at 2712. Leegin also attempted to present a pro-competitive justification at trial, but the trial court excluded the expert testimony as irrelevant given the per se rule. See *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 2:03-CV-107, 2004 U.S. Dist. LEXIS 30414, at \*14–15 (E.D. Tex. Mar. 25, 2004).

illegality.<sup>23</sup> On appeal, Leegin argued that minimum resale price maintenance can have procompetitive effects and therefore should not be considered illegal per se.<sup>24</sup>

The Supreme Court agreed with Leegin that there was no longer justification for the *Dr. Miles* rule that minimum resale price maintenance is illegal per se, and held that these agreements should be judged by a rule of reason standard instead.<sup>25</sup> The Court further held that the rationale for using a per se standard in *Dr. Miles* is flawed, and instead required an economic analysis to determine whether pricing restraints are so likely to have an anticompetitive effect as to justify an irrefutable per se presumption.<sup>26</sup> The Court continued by analyzing the economics of minimum resale price maintenance, noting that “economics literature is replete with procompetitive justifications,”<sup>27</sup> and as such, the presumption of anticompetitive effect necessary to support a per se rule cannot be established.<sup>28</sup> In overruling *Dr. Miles*, the Court rationalized its failure to follow precedent by explaining that “the Sherman Act [is] a common-law statute” that must adapt to “the dynamics of present economic conditions.”<sup>29</sup>

B. *Development of Resale Price Maintenance Law: Moving Towards Leegin*

The Sherman Act of 1890, 15 U.S.C. § 1, provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal.”<sup>30</sup> Early Sherman Act cases established that horizontal price agreements, where two competing companies agree on a price to charge, were illegal

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<sup>23</sup> *Leegin*, 127 S. Ct. at 2712.

<sup>24</sup> *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 171 F. App’x 464, 466–67 (5th Cir. 2006).

<sup>25</sup> *Leegin*, 127 S. Ct. at 2725.

<sup>26</sup> *Id.* at 2713–14 (noting “more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based”).

<sup>27</sup> *Id.* at 2714.

<sup>28</sup> *Id.* at 2717–18.

<sup>29</sup> *Id.* at 2720.

<sup>30</sup> Sherman Act, 15 U.S.C. § 1 (2000).

regardless of claims of reasonableness.<sup>31</sup> The Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>32</sup> held that the Sherman Act also applied to vertical resale price agreements, where a retailer and its supplier agree on a price.<sup>33</sup> The *Dr. Miles* Court found these resale price maintenance agreements comparable to “a general restraint upon alienation,”<sup>34</sup> and therefore illegal per se.<sup>35</sup> Under this standard, the arguable benefits of a price arrangement are irrelevant and the arrangement is irrefutably presumed anticompetitive.<sup>36</sup>

Given the potential harshness of the *Dr. Miles* rule, the Supreme Court carved out an exception in *United States v. Colgate & Co.*<sup>37</sup> Under the *Colgate* doctrine, the Court allows use of unilateral resale price maintenance, where the manufacturer acts alone to set retail prices without any agreements and enforces the prices by discontinuing sales to non-conforming retailers.<sup>38</sup> More recent cases have reaffirmed and expounded the *Colgate* rule.<sup>39</sup>

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<sup>31</sup> 2 JOSEPH P. BAUER & WILLIAM H. PAGE, KINTNER FEDERAL ANTITRUST LAW § 11.17 (2d ed. 2002).

<sup>32</sup> 220 U.S. 373 (1911).

<sup>33</sup> *Id.* at 409 (holding “the restrictions sought to be enforced . . . were invalid . . . under the [Sherman Act]”).

<sup>34</sup> *Id.* at 404.

<sup>35</sup> *Id.* at 409.

<sup>36</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (noting with approval lower court holding that *Dr. Miles* “per se rule rendered irrelevant any procompetitive justifications”).

<sup>37</sup> 250 U.S. 300 (1919). See generally BAURER & PAGE, *supra* note 31, § 12.5 (discussion of *Colgate* doctrine).

<sup>38</sup> *Colgate*, 250 U.S. at 306–07.

<sup>39</sup> See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (holding termination of a retailer for not following price list was permissible following the demand for such action by a second retailer); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (holding termination of a retailer following complaints from rival retailers was insufficient to establish concerted non-unilateral action, but rather “[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently”). See generally 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶1623d (2d ed. 2004) (discussing *Monsanto* decision and enforcement of unilateral policies); BAURER & PAGE, *supra* note 31, § 12.6 (discussing standards for finding concerted or unilateral behavior post-*Colgate*).

While *Colgate* has provided an avenue for businesses to legally implement resale price maintenance, policies claiming to be unilateral, and therefore falling under the *Colgate* rule, are often disputed as to whether they are truly unilateral or actually represent proscribed bilateral agreements.<sup>40</sup> Frequently courts have struggled to ascertain the existence of agreements and whether those agreements amounted to minimum resale price agreements.<sup>41</sup>

For several decades, from the 1930s until 1975, minimum resale price maintenance was legal in several states under the respective state fair trade laws, first exclusively in intrastate commerce, and then also in interstate commerce under the Miller-Tydings Act of 1937.<sup>42</sup> Over time though, fair trade laws gradually lost favor and began being repealed by states, culminating in the Consumer Goods Pricing Act of 1975 that expressly repealed the Miller-Tydings Act and ended state-legalized minimum resale price maintenance.<sup>43</sup> The free trade period is notable as it provided empirical data useful for analyzing the impacts of minimum resale price maintenance.<sup>44</sup>

Following that period, the Supreme Court, in reviewing agreements between manufacturers and retailers regarding non-price constraints or maximum resale prices, moved away from per se prohibitions to case-by-case analysis based on a rule of reason standard. When a manufacturer restricts a retailer in areas other

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<sup>40</sup> *Monsanto*, 465 U.S. at 762 (observing that the distinction between unilateral and concerted action is “often . . . difficult to apply in practice”); see, e.g., *Leegin*, 127 S. Ct. at 2712 (noting *Leegin* and *PSKS* disagreed on whether the pricing policy was unilateral or bilateral).

<sup>41</sup> See 8 AREEDA & HOVENKAMP, *supra* note 39, ¶ 1623e (trouble evaluating reseller terminations in context of complaints from competing resellers).

<sup>42</sup> LOUIS ALTMAN & MALLA POLLACK, 1A CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 6:3 (4th ed. 2007); see also THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 4–5 (1983) (describing fair trade and Miller-Tydings Act).

<sup>43</sup> ALTMAN & POLLACK, *supra* note 42, § 6:4.

<sup>44</sup> See OVERSTREET, *supra* note 42, at 106 (using fair trade data to analyze resale price maintenance impacts).



than setting prices,<sup>45</sup> this is a non-price vertical restraint. In *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>46</sup> the Court held that such non-price vertical restraints were not per se illegal under the Sherman Act.<sup>47</sup> Another type of vertical agreement is a *maximum* resale price agreement, which establishes the highest price that a retailer may set. In *State Oil Co. v. Khan*,<sup>48</sup> the Court overruled the per se rule and held that vertical maximum price agreements should be judged under a rule of reason framework.<sup>49</sup> The *Khan* Court began by holding that per se rules should be used only when the restraint has a “predictable and pernicious anticompetitive effect.”<sup>50</sup> The Court went on to determine that maximum price agreements do not have a clear anticompetitive effect<sup>51</sup> and found *stare decisis* should not impede the evolving interpretation of the Sherman Act.<sup>52</sup> This rationale in *Khan* directly foreshadows the later *Leegin* analysis.<sup>53</sup>

### III. ANALYSIS

#### A. *Rule of Reason Standard: Providing Greater Access to Resale Price Maintenance*

The former rule of per se illegality for minimum resale price maintenance resulted in uniform outcomes with all bilateral minimum price agreements being held illegal regardless of justification.<sup>54</sup> In contrast, the new rule of reason standard relies

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<sup>45</sup> Examples of such restraints are geographic sales area restrictions and class-based customer allocations. See 8 AREEDA & HOVENKAMP, *supra* note 39, ¶ 600b, at 4; BAURER & PAGE, *supra* note 31, § 12.9.

<sup>46</sup> 433 U.S. 36 (1977).

<sup>47</sup> *Id.* at 57–59 (holding that the per se prohibition on non-price vertical restraints is overruled, as such restraints lack the necessary certain anticompetitive effect).

<sup>48</sup> 522 U.S. 3 (1997).

<sup>49</sup> *Id.* (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)).

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Id.* at 14–19.

<sup>52</sup> *Id.* at 20–22.

<sup>53</sup> See *supra* text accompanying notes 25–29.

<sup>54</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (noting the per se rule required the exclusion of evidence of pro-competitive effects in pricing policies).

on case-by-case judgments.<sup>55</sup> Accordingly, the impact of the new rule will depend on how the lower courts apply it.<sup>56</sup> In the *Leegin* opinion, the Supreme Court gave some indications of what it viewed as the boundaries of proper behaviors<sup>57</sup> and provided a general summary of the rule:

Under [the rule of reason], the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect[s] that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.<sup>58</sup>

The rule of reason standard has been extensively applied in Sherman Act § 1 cases concerning other sorts of restraints.<sup>59</sup> These shifts to a rule of reason from a per se standard in the judgment of non-price vertical restraints are especially helpful in anticipating how the rule will be implemented in the minimum resale price maintenance context.<sup>60</sup> In analyzing the *Leegin* rule of reason, it is appropriate to begin with a review of case law applying the new decision.

### 1. *Early Indicators in Post-Leegin Lower Court Decisions*

In the months following the *Leegin* decision, the federal courts have begun applying the decision in antitrust cases. The U.S.

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<sup>55</sup> *Id.* (stating that under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited” (emphasis added) (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977))).

<sup>56</sup> See *infra* Part III.A.1 (surveying early lower court decisions); see also *infra* Part III.A.3 (reviewing application of rule of reason in other vertical restraint contexts).

<sup>57</sup> See discussion *infra* Part III.A.2.

<sup>58</sup> *Leegin*, 127 S. Ct. at 2712–13 (internal quotations and citations omitted).

<sup>59</sup> *Id.* at 2711 (calling the rule of reason “the usual standard applied to determine if there is a violation of [Sherman Act] § 1”). See generally BAURER & PAGE, *supra* note 31, § 9.6 (situations of use of rule of reason versus per se standard).

<sup>60</sup> See *infra* Part III.A.3.

District Court for the Southern District of Ohio applied the *Leegin* rule to an allegation of vertical price fixing in *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*.<sup>61</sup> In *Total Benefits*, the court held that the plaintiff failed to properly state an antitrust claim and therefore dismissed the claim, but in the process cited a test for applying the rule of reason.<sup>62</sup> The U.S. District Court for the District of Alaska also recently relied on *Leegin* for the proposition that vertical price restraints must pass a rule of reason analysis, but the court did not apply this analysis to its end conclusion, finding the behavior in the case did not rise to the level of resale price maintenance.<sup>63</sup> Given the results of these cases, no substantial conclusions on lower court application can be drawn until a case presents conduct previously proscribed under the per se rule, permitting the rule of reason to alter the outcome of the case. Nevertheless, we can turn to the *Leegin* decision for guidance on how the rule should be applied.

## 2. *Guidance on the Rule of Reason Provided by Leegin*

As reviewed in this section, the Supreme Court in *Leegin* made several statements explaining how the rule of reason should be applied to minimum resale price maintenance. On an economic policy level, the Court explained three procompetitive effects that

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<sup>61</sup> No. 1:05CV519, 2007 U.S. Dist. LEXIS 53862, at \*14 (S.D. Ohio July 25, 2007).

<sup>62</sup> *Id.* at \*16 (“[T]he plaintiff must prove . . . (1) that the defendants contracted, combined, or conspired; (2) that the scheme produced anticompetitive effects; (3) that the restraint affected relevant product and geographic markets; (4) that the object of the scheme and the conduct resulting from it was illegal; and (5) that the scheme was a proximate cause of the plaintiff’s antitrust injury.” (citing *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336, 343 (6th Cir. 2006)). The *Expert Masonry* court went on to note that once the plaintiff has made this prima facie case, the burden shifts to the defendant to demonstrate a procompetitive effect. *Expert Masonry*, 440 F.3d at 343. If a procompetitive effect is shown, the plaintiff can show that there are less restrictive means to attain the same procompetitive end. *Id.* This test is more procedurally oriented, but compares favorably to the rule of reason summary in *Leegin*, particularly to the key attribute of demonstrated anticompetitive effect. See *supra* note 58 and accompanying text.

<sup>63</sup> *Alaska Rent-A-Car, Inc. v. Cendant Corp.*, No. 3:03-CV-00029-TMB, 2007 U.S. Dist. LEXIS 55474, at \*73–85 (D. Alaska July 27, 2007).

can justify use of minimum resale price maintenance.<sup>64</sup> First, minimum resale price maintenance can be used to “encourage[] retailers to invest in services . . . or promotional efforts that aid the manufacturer’s position as against rival manufacturers.”<sup>65</sup> Second, restrictions can prevent free riding, which occurs when the customers of low-cost, low-service retailers obtain benefits from services of a high cost retailer without paying for them.<sup>66</sup> Lastly, minimum resale price maintenance can facilitate the incubation of new products on the market, allowing investment in product reputation by preventing fierce price wars.<sup>67</sup> Manufacturers who are able to justify their resale price maintenance programs using one of these three recognized procompetitive effects will have a higher likelihood of having their programs upheld under a rule of reason analysis.<sup>68</sup>

The Court went further to explain situational factors indicative of minimum resale price maintenance policies that are either proper or improper under the rule of reason.<sup>69</sup> These factors include market power of manufacturers or retailers, the fraction of competitors in a single market that have adopted policies, and the involvement of retailers in initiating the agreements.<sup>70</sup> Each of these factors will be examined in turn below.

The presence or absence of manufacturer market power is a factor, as “[a] manufacturer with market power . . . might use resale price maintenance to give retailers an incentive not to sell

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<sup>64</sup> *Leegin*, 127 S. Ct. at 2715–16.

<sup>65</sup> *Id.* at 2715.

<sup>66</sup> *Id.* at 2716 (“If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider.”).

<sup>67</sup> *Id.* (noting that for new products, “if markets can be penetrated by using resale price maintenance there is a procompetitive effect”).

<sup>68</sup> *Id.* at 2713 (procompetitive effects that are positive in the rule of reason balance).

<sup>69</sup> *Id.* at 2717 (improper uses); *see id.* at 2719–20 (“factors . . . relevant to the inquiry”).

<sup>70</sup> *Id.* at 2717.

the products of smaller rivals or new entrants.”<sup>71</sup> Market power of the retailer is also a factor, as a powerful retailer “might request resale price maintenance to forestall innovation in distribution that decreases costs.”<sup>72</sup> In contrast, “[i]f a retailer lacks market power, manufacturers likely can sell their goods through rival retailers.”<sup>73</sup>

The second situational factor the *Leegin* Court suggested is the proportion of competing firms in a given marketplace making use of minimum resale price maintenance agreements.<sup>74</sup> These agreements are more likely to have anticompetitive effects if used extensively in a market, and the Court stated they “should be subject to more careful scrutiny . . . if many competing manufacturers adopt the practice.”<sup>75</sup> In particular, with light usage of resale price maintenance, “there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers.”<sup>76</sup> Similar competitive pressures discourage retail cartels<sup>77</sup> in markets where resale price maintenance is rare.<sup>78</sup>

A third and final factor the *Leegin* Court suggested is the involvement of retailers in initiating the minimum resale price maintenance policy.<sup>79</sup> The Court emphasized that when vertical

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<sup>71</sup> *Id.*; see also *id.* at 2720 (noting “if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets”).

<sup>72</sup> *Id.* at 2717.

<sup>73</sup> *Id.* at 2720.

<sup>74</sup> *Id.* at 2719 (noting that the presence of manufacturers not using minimum resale price maintenance provides inter-brand competitive options to consumers).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> A cartel exists when competing firms “replace independent decisions with an agreement on price, output, or related matters.” 2B PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 405a, at 28 (3d ed. 2007) (defining cartels).

<sup>78</sup> *Leegin*, 127 S. Ct. at 2719 (noting that “a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance” and that “competition would divert consumers to lower priced substitutes and eliminate any gains . . . from . . . price-fixing”).

<sup>79</sup> *Id.* at 2717.

restraints are used to implement retail cartels, they should be treated the same as horizontal restraints, which are still considered per se illegal.<sup>80</sup> Evidence that retailers advocated for the minimum resale price policy suggests an impermissible restraint.<sup>81</sup> However, if “a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct.”<sup>82</sup>

Together, these three factors provide guidance on procompetitive justifications that courts should consider under the rule of reason as well as situations where careful judicial attention is warranted.<sup>83</sup> In considering the *Leegin* case, amici curiae urged the Court to adopt intermediate standards between a rule of reason and a per se prohibition.<sup>84</sup> Such intermediate standards could address particular practices known to have anticompetitive effects.<sup>85</sup> The Court rejected this approach, however, and stressed that the factors it listed are only part of a rule of reason analysis.<sup>86</sup>

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<sup>80</sup> *Id.* (noting per se unlawfulness of horizontal agreements and vertical agreements operating as horizontal cartels “need to be held unlawful under the rule of reason”).

<sup>81</sup> *Id.* at 2719.

<sup>82</sup> *Id.*

<sup>83</sup> See *infra* Part III.A.4 for a discussion of the implications of these factors on online retailers.

<sup>84</sup> Brief for William S. Comanor and Frederic M. Scherer as Amici Curiae Supporting Neither Party at 8–10, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 173679 [hereinafter Comanor and Scherer Brief] (arguing for “quick look” tests that would shift presumption of competitive effect).

<sup>85</sup> See *id.*

<sup>86</sup> See *Leegin*, 127 S. Ct. at 2719 (before listing factors, calling it “a realistic objective” for lower courts to be “diligent in eliminating . . . anticompetitive uses” via the rule of reason). The Supreme Court’s insistence on the rule of reason here is important for logical consistency with its posture that the rule of reason is the default Sherman § 1 rule and per se illegal is the exception, and that the rule of reason is favorable to the common law adaptive Sherman doctrine used to avoid stare decisis concerns. See *id.* at 2712–13 (describing preference for rule of reason over per se rules); *id.* at 2720–21 (noting “the rule of reason has implemented this common-law approach”).

### 3. *Lessons from the Rule of Reason Elsewhere in Sherman Act Jurisprudence*

In moving to a rule of reason standard in *Leegin*, the Supreme Court was not inventing a new standard but rather adopting one that “is the accepted standard for testing whether a practice restrains trade in violation of [Sherman Act] section 1.”<sup>87</sup> This is not to say per se rules are altogether gone, as per se prohibitions remain against practices such as horizontal price fixing and agreeing to divide markets, but the Court views these per se rules as the exception.<sup>88</sup> A shift from a per se rule to a rule of reason for a particular type of restraint is not novel, and the Supreme Court made a similar shift for non-price vertical restraints in 1977<sup>89</sup> and for vertical maximum price restraints in 1997.<sup>90</sup> Yet, in the case of maximum price restraints, very little case law exists invalidating restraints under the rule of reason.<sup>91</sup> Because maximum price restraints, by definition, force prices down, establishing how the restraint harms competition is difficult.<sup>92</sup>

In contrast to maximum price restraints, the rule of reason standard for non-price vertical restraints established in *GTE Sylvania* has been applied in a number of cases.<sup>93</sup> Even so, the courts are split on whether to apply single or multi-step tests when applying the rule of reason in this context.<sup>94</sup> Some circuits apply a

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<sup>87</sup> *Id.* at 2712.

<sup>88</sup> *Id.* at 2713.

<sup>89</sup> See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>90</sup> See *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

<sup>91</sup> BAURER & PAGE, *supra* note 31, § 12.8, at 198 (noting “there is no post-*Khan* reported case to date in which a plaintiff has successfully challenged maximum resale price maintenance”). Based on a review of cases citing *Khan*, the conclusion reached by Baurer and Page regarding the lack of cases appears to hold five years after publication of the treatise volume.

<sup>92</sup> See *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 486 (S.D.N.Y. 2001) (noting, in the context of procompetitive effects under the rule of reason, that “[a]t a basic level, maximum resale price maintenance may be consumer-friendly, as the practice evidences a manufacturer’s desire to keep prices below a stated point and closer to competitive levels”).

<sup>93</sup> See BAURER & PAGE, *supra* note 31, § 12.12 (noting dozens of post-*Sylvania* decisions).

<sup>94</sup> *Id.* § 12.12, at 212–13.

holistic balancing test, where all competitive factors are weighed.<sup>95</sup> Other circuits use a two-step balancing test, where the plaintiff must first meet a threshold requirement—demonstrating the defendant has market power with respect to the product—before the court will weigh competitive factors.<sup>96</sup> Lastly, still other circuits employ a three-step test, sequentially seeking: (1) proof from the plaintiff of “an actual adverse effect on competition”; (2) proof from the defendant of a procompetitive justification; and (3) proof from the plaintiff of a less restrictive means to accomplish the procompetitive effect.<sup>97</sup> It remains to be seen whether these variations of applied rule of reason tests will become standard for minimum resale price maintenance cases. Early indications show that they will become standard. For example, the *Total Benefits* court, acting post-*Leegin*, pointed to a similar three-step test as applicable to minimum pricing cases.<sup>98</sup> In any case, the test a court applies will affect how difficult it will be for a minimum resale price maintenance plaintiff to meet its burden of proof. In particular, while market power<sup>99</sup> is always a rule of reason factor,<sup>100</sup> tests requiring its demonstration as a threshold issue give market power more weight compared to other factors.

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<sup>95</sup> *Id.* § 12.12, at 212–13 & n.177 (noting use by the Third and Ninth Circuits).

<sup>96</sup> *Id.* § 12.12, at 212 & n.175 (noting use by the Fifth, Seventh, and Eighth Circuits).

<sup>97</sup> *Id.* § 12.12, at 213 & n.179 (noting use in the Second Circuit); 2 JOSEPH P. BAUER & WILLIAM H. PAGE, KINTNER FEDERAL ANTITRUST LAW 25 n.179 (Supp. 2004) (noting use in the Fourth Circuit). *But cf.* 8 AREEDA & HOVENKAMP, *supra* note 39, ¶1645a (characterizing the three-step test as standard but suggesting the level of structure for tests advances as courts become more familiar with a particular sort of restraint).

<sup>98</sup> *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, No. 1:05CV519, 2007 U.S. Dist. LEXIS 53862, at \*16 (S.D. Ohio July 25, 2007); *see also supra* notes 61–62 and accompanying text.

<sup>99</sup> The definition of market power is not unequivocally clear in this Sherman context, but can be thought of as the extent to which a company can take actions beyond the ability expected in a competitive situation. *See* RICHARD A. POSNER, ANTITRUST LAW 124 (2d ed. 2001); *see also* 2B AREEDA, HOVENKAMP & SOLOW, *supra* note 77, ¶501 (defining market power). Concentration of firms in the market is a related concern. *See* POSNER, *supra*, at 124–25.

<sup>100</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (listing market power as a rule of reason factor).



Affording market power such weight is consistent with the *Leegin* opinion.<sup>101</sup>

Some evidence suggests that evaluation under a rule of reason standard can result in a practice being de facto legal.<sup>102</sup> This has been the result of the application of the rule of reason in the vertical maximum price context.<sup>103</sup> Briefs supporting the respondent-retailer in *Leegin* cite the high cost of rule of reason litigation as discouraging otherwise meritorious claims.<sup>104</sup> Therefore, it is reasonable to expect that a greater fraction<sup>105</sup> of minimum resale price maintenance programs will go unchallenged under the *Leegin* rule of reason.

#### 4. *Online Retailers in Rule of Reason: Facing More Restrictions*

The preceding sections have analyzed the *Leegin* rule of reason standard. This section focuses on questions of how minimum resale price maintenance under the new standard may affect online retailers. First, this section will discuss the three procompetitive impacts listed by the Supreme Court in *Leegin*: providing a margin for provision of services, preventing free riding by discounters on full service retailers, and allowing for incubation of new products.<sup>106</sup> Next, this section will review the situational factors<sup>107</sup> the Court suggests for informing rule of reason analysis.

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<sup>101</sup> See *id.* at 2713 (noting “market power is a . . . significant consideration”); see also *id.* at 2717 (describing market power of manufacturer or retailer as a concerning situation).

<sup>102</sup> BAURER & PAGE, *supra* note 31, § 9.7, at 12; see also Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 349–50 (2000).

<sup>103</sup> See *supra* notes 91–92 and accompanying text.

<sup>104</sup> Brief of Amicus Curiae Consumer Federation of America in Support of Respondent at 21–22, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 621853 [hereinafter Consumer Federation Brief]; Anderson Economic Group Brief, *supra* note 17, at 7.

<sup>105</sup> While the cost of litigation serves to discourage challenging minimum resale price maintenance programs, the overall number of programs challenged may still go up due to the increased overall use of the programs by manufacturers.

<sup>106</sup> See *supra* notes 65–67 and accompanying text.

<sup>107</sup> See *supra* notes 71–82 and accompanying text.

Finally, this section will analyze the general impact of minimum resale price maintenance in a market.

When the Court discusses minimum resale price maintenance as a tool to provide margins that promote provision of services, it speaks of “fine showrooms, . . . product demonstrations, or . . . knowledgeable employees,”<sup>108</sup> which immediately brings to mind a traditional brick-and-mortar store. While it is certainly possible for one online retail store to offer more services than another,<sup>109</sup> perhaps by providing detailed product information websites and a knowledgeably staffed hotline, it is hard to envision these services comparing to the cost of traditional retail services. At minimum, allowing manufacturers to adopt minimum resale price policies to provide a margin for the provision of services disfavors retail channel diversity, as such a margin must be adequate for the most efficient retailer in the *least* efficient channel.<sup>110</sup> Online retailers may have lower overhead and greater efficiency, so they stand to lose under this analysis.

The Supreme Court further provides that combating free riding is a procompetitive use of minimum resale price maintenance.<sup>111</sup> Online retailers are often accused of free riding on the services provided by their traditional brick-and-mortar competitors.<sup>112</sup> The free riding concern is not without critics, including economists and

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<sup>108</sup> *Leegin*, 127 S. Ct. at 2715. Free riding can be characterized as a positive externality issue, where benefits flowing from a retail program are not fully harnessed by a retailer, leading to less provision of the program than socially desirable. See 8 AREEDA & HOVENKAMP, *supra* note 39, ¶ 1613b, at 153.

<sup>109</sup> Indeed, price dispersion in online retail stores suggests varying levels of services. See Ancarani & Shankar, *supra* note 5, at 185.

<sup>110</sup> Note that if the manufacturer created a dual pricing policy with an online price different from its traditional retail price, one price would have to be higher than the other. It follows that consumers would learn that one channel's prices could never be competitive with the other channel's prices.

<sup>111</sup> *Leegin*, 127 S. Ct. at 2716.

<sup>112</sup> See, e.g., Bakos, *supra* note 5, at 76–77; Dennis W. Carlton & Judith A. Chevalier, *Free Riding and Sales Strategies for the Internet*, 49 J. INDUS. ECON. 441 (2001); Sebastian Van Baal & Christian Dach, *Free Riding and Customer Retention Across Retailers' Channels*, J. INTERACTIVE MARKETING, Spring 2005, at 75, 77–78.

others who are skeptical of how often it actually occurs.<sup>113</sup> It is also conceivable that some free riding occurs in the opposite direction, with consumers using the information resources of an online retailer before purchasing from a local brick-and-mortar retailer.<sup>114</sup> Nevertheless, free riding is a plausible justification for resale price maintenance policies adverse to online retailers.

The new product protection procompetitive rationale<sup>115</sup> also has e-commerce implications. In particular, as e-commerce allows manufacturers to connect with distant customers, direct sales from manufacturer to end consumer are more feasible. Resale price maintenance is inapplicable to products sold directly from manufacturer to consumer,<sup>116</sup> allowing the manufacturer to freely set prices necessary to assist a product launch. If a manufacturer can protect the price of a new product without resorting to direct sales, it may be encouraged to introduce more new products in traditional retail channels, reducing the number of products appearing exclusively on Internet direct sales sites. In the general case, both traditional and online retailers are likely to find utility in protective margins as they insert the product into inventory and undertake promotion of the product. As such, the new product

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<sup>113</sup> See Comanor and Scherer Brief, *supra* note 84, at 6–7 (noting “skepticism in the economic literature” regarding the frequency of free riding); Brief of the American Antitrust Institute as Amicus Curiae in Support of Respondent at 19 n.25, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 621856 [hereinafter American Antitrust Institute Brief] (expressing skepticism about product categories capable of sustaining free riding (citing 8 AREEDA & HOVENKAMP, *supra* note 39, ¶ 1601e, at 13)).

<sup>114</sup> See Consumer Federation Brief, *supra* note 104, at 18; *see also* American Antitrust Institute Brief, *supra* note 113, at 19 n.24 (claiming Internet competition has improved brick-and-mortar efficiency, which should not be considered harmful).

<sup>115</sup> *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977) (“[M]anufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer.”).

<sup>116</sup> See 8 AREEDA & HOVENKAMP, *supra* note 39, ¶ 1622c (stating that resale price maintenance is clearly inapplicable to direct sales from manufacturer to consumer, but noting complexities if other intermediaries play some role in the transaction).

protection rationale does not seem to be particularly problematic for the ordinary online retailer.

Among the situational factors the Supreme Court highlights for examination by lower courts,<sup>117</sup> both lack of market power and lack of concentrated resale price maintenance policies support an inference of an allowable restraint. Market power is difficult to establish,<sup>118</sup> and few industries have high concentrations of minimum price maintenance.<sup>119</sup> With some circuits favoring market power as a threshold issue,<sup>120</sup> difficulty with market power demonstration may be particularly problematic for a complaining retailer, resulting in many minimum resale price maintenance agreements being upheld. Accordingly, both online and traditional discount retailers can expect to be impacted as fewer minimum resale price maintenance policies are invalidated.

The other situational factor, the suspect nature of retailer-induced resale price maintenance,<sup>121</sup> should operate to the benefit of online retailers. Conceivably, traditional retailers might pressure manufacturers for minimum resale price maintenance to combat their online competitors. Online retailers should not be overly concerned about this possibility due to the Court's recognition of the problematic nature of retailer induced vertical restraints and their similarity to per se illegal horizontal restraints.<sup>122</sup>

Regardless of how these particular factors impact online retailers, the most basic market effect of minimum resale price

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<sup>117</sup> See *supra* notes 71–82 and accompanying text.

<sup>118</sup> See *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting) (noting consideration “of ‘market power’ . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets”); 2B AREEDA, HOVENKAMP & SOLOW, *supra* note 77, ¶ 504 (noting the difficulty in technical determination of market power).

<sup>119</sup> At least in the short term, markets concentrated with minimum resale price maintenance agreements are unlikely, as such agreements previously were illegal. Once businesses can react to the new *Leegin* rule, this conclusion may not necessarily hold.

<sup>120</sup> See *supra* note 97 and accompanying text.

<sup>121</sup> See *supra* notes 80–82 and accompanying text.

<sup>122</sup> *Leegin*, 127 S. Ct. at 2717 (discussing relationship of vertical schemes and horizontal cartels).

maintenance is higher prices for consumers.<sup>123</sup> Notably, the *Leegin* majority expends more effort explaining why higher prices might not be bad than it does disputing the contention that higher prices will occur.<sup>124</sup> While it is possible to envision situations where demand for a higher-priced product will not decrease,<sup>125</sup> higher prices will lead to less items purchased by consumers in the aggregate.<sup>126</sup> As a result, online retailers would be burdened both by reduced access to price competition, if directly restricted by price policies, and by reduced budgets of customers the retailer has in common with price-restricted businesses and industries. Accordingly, should enough resale price maintenance policies be implemented to cause these higher prices, an adverse impact on discount online retailers will occur.

Discount online retailers competing on price are harmed by policies that reduce their ability to set prices. The *Leegin* rule of reason standard makes minimum resale price maintenance policies adverse to these retailers legally available to manufacturers. If enough manufacturers elect to implement these policies, online discounting, and thus, online retailing in general stand to be greatly reduced.

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<sup>123</sup> OVERSTREET, *supra* note 42, at 160 (noting empirical studies showing increasing price and that “both procompetitive and anticompetitive economic theories of [resale price maintenance] predict . . . [higher] product prices”); *see also Leegin*, 127 S. Ct. at 2728 (Breyer, J., dissenting); 8 AREEDA & HOVENKAMP, *supra* note 39, ¶ 1604b, at 40 (“Indeed, the restraint that did not hold a product’s price above the level that would otherwise prevail would be unnecessary; its very purpose is to prevent price cutting.”).

<sup>124</sup> *Leegin*, 127 S. Ct. at 2718–19 (noting better service might compensate for higher prices and that, beyond resale price maintenance, “[m]any decisions . . . lead to higher prices”).

<sup>125</sup> In addition to the concept of consumers placing a value on services, simple price inelasticity of demand and poor substitutes will lead to this result. *See generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 273–75 (6th ed. 2003) (discussing elasticity of demand).

<sup>126</sup> The exception would be if the additional revenue is flowing back to the consumer, so the median consumer is made wealthier, in absolute dollar terms, by the higher prices. This inflationary outcome is distant and speculative.

### B. *Predictions of Real-World Usage of Resale Price Maintenance*

While manufacturers may enjoy much broader legal access to minimum resale price maintenance policies as a result of the Supreme Court's decision in *Leegin*, this decision does not mean that manufacturers will elect to implement these policies. Indeed, a number of factors, as discussed in this section, support the conclusion that such policies will not see widespread use. If true, this outcome would prevent *Leegin* from greatly harming discount e-commerce. First, history from the fair trade period suggests many companies will not implement such policies.<sup>127</sup> Second, the previous availability of resale price maintenance under the *Colgate* doctrine reduces the scope of new options *Leegin* affords suppliers.<sup>128</sup> Finally, substantial marketplace and efficiency incentives exist discouraging manufacturers from using resale price maintenance.<sup>129</sup>

#### 1. *Evidence From Fair Trade History*

During the fair trade period, minimum resale price maintenance was legal in many states.<sup>130</sup> The Supreme Court in *Leegin* points out that during the peak of resale price maintenance, only one percent of manufacturers used this practice, affecting between four and ten percent of retail goods.<sup>131</sup> While this is strong evidence that resale price maintenance is a special-case business tool, Justice Stephen Breyer, in his dissent, observes that ten percent of retail sales still amounts to \$300 billion in goods.<sup>132</sup> Arguably, this history provides assurance that minimum resale price maintenance is not likely to become the norm, but it does not conclusively foreclose the possibility that these policies will harm online retailers.

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<sup>127</sup> See *infra* Part III.B.1.

<sup>128</sup> See *infra* Part III.B.2.

<sup>129</sup> See *infra* Part III.B.3.

<sup>130</sup> See *supra* text accompanying notes 42–44.

<sup>131</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007) (“It is also of note that during this time ‘when the legal environment . . . was most favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts.’” (brackets in original) (quoting *OVERSTREET*, *supra* note 42, at 6)).

<sup>132</sup> *Leegin*, 127 S. Ct. at 2735 (Breyer, J., dissenting).

2. *Colgate Utilization: Minimum Resale Price Maintenance is Already Available*

Unilateral resale price maintenance has been legal under *Colgate* almost as long as bilateral resale price maintenance was illegal under *Dr. Miles*.<sup>133</sup> It is reasonable to conclude that at least some manufacturers desiring a uniform retail price have already been enforcing one under *Colgate*. As the facts of *Leegin* demonstrate, unilateral programs always run the risk of being found bilateral.<sup>134</sup> The implementation of a legally effective unilateral program can also be quite costly.<sup>135</sup> In the end, *Colgate* utilization is most likely suggestive of the types of companies most interested in using minimum resale price maintenance policies.

3. *Disincentives to Resale Price Maintenance*

Both inherent efficiency considerations and the realities of the modern retail marketplace create substantial disincentives to implementation of resale price maintenance. First, even if consumer free riding is an issue for a given product, the interests of the manufacturer may not be sufficiently aligned with the retailers to cause the manufacturer to take action. The consumer is not free riding off the manufacturer, but is instead free riding off a retailer, thereby imposing a cost on the retailer. If this retailer continues to sell the product, the cost will not be passed on to the manufacturer,<sup>136</sup> who still derives the benefit from the discounter's sale. In effect, this is a form of price discrimination, allowing the manufacturer to capture the sales of marginal consumers who

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<sup>133</sup> See *supra* notes 37–40 and accompanying text.

<sup>134</sup> *Leegin*, 127 S. Ct. at 2712 (describing *Leegin* defending its policy as a unilateral restraint); see also Christopher S. Finnerty, *Resale Price Maintenance and Long Term Distribution Strategy*, *INDUSTRY WK.*, Aug. 20, 2007, <http://www.industryweek.com/ReadArticle.aspx?ArticleID=14816> (on file with the North Carolina Journal of Law & Technology) (characterizing *Leegin* as providing a strategic fallback defense that makes unilateral policies less risky).

<sup>135</sup> PING Brief, *supra* note 9, at 9–10 (noting the lengths to which PING goes to avoid retailer assent).

<sup>136</sup> The assumption of continued sales is particularly realistic if the manufacturer has clout in the market with products that would be conspicuously absent.

would otherwise go elsewhere. The manufacturer is effectively free riding off its own higher-end retailers.

More importantly, pricing efficiency disfavors resale price maintenance.<sup>137</sup> The Supreme Court notes in *Leegin* that “[t]he difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer’s cost of distribution, which, like any other cost, the manufacturer usually desires to minimize.”<sup>138</sup> The court further explains that “retailers, not the manufacturer, gain from higher retail prices.”<sup>139</sup> Retailers are inherently closer to consumers and are therefore in a better position to respond to market changes. When the manufacturer acts as a central pricing authority, there is a risk of a sluggish response to changes in market conditions, harming sales in a dynamic market.<sup>140</sup> The speed at which fast systems move information between parties comes at a cost. Due to these pricing efficiency concerns, competition among retailers is a valuable tool to the overall competitiveness of the brand. For this reason, manufacturers may prefer to leave retail pricing decisions to the retailers.

Additionally, some conditions in the present-day retailing market discourage the use of minimum resale price maintenance. In particular, large discount retailers such as Wal-Mart have

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<sup>137</sup> See *Leegin*, 127 S. Ct. at 2718–19. In its amicus curiae brief, the American Antitrust Institute challenged the notion that a manufacturer would adopt resale price maintenance only if the price would be efficient, suggesting that retailer pressure could influence a manufacturer to look beyond efficiency. American Antitrust Institute Brief, *supra* note 113, at 15–16. The risk of this retailer pressure should be reduced, as the *Leegin* Court was clear that retailer involvement was improper and analogous to a proscribed horizontal agreement. *Leegin*, 127 S. Ct. at 2717; see also *supra* notes 79–82 and accompanying text.

<sup>138</sup> *Leegin*, 127 S. Ct. at 2718.

<sup>139</sup> *Id.* at 2719 (also noting that “[a] manufacturer has no incentive to overcompensate retailers with unjustified margins”).

<sup>140</sup> See 8 AREEDA & HOVENKAMP, *supra* note 39, ¶ 1632c4, at 321 (noting risk that resale price maintenance can cause “long delayed” price corrections by manufacturers). This efficiency concern was advanced to the Court as a reason not to abandon the *Dr. Miles* per se rule. American Antitrust Institute Brief, *supra* note 113, at 14–15. However, it applies equally well as a practical constraint on the self-aware, efficiency-oriented manufacturer.



sizable market power.<sup>141</sup> Specifically, Wal-Mart has a history of opposition to resale price maintenance dating back to at least 1982 when executive S. Robson Walton expressed concern that overruling the per se rule could damage the young business.<sup>142</sup> In the present day, Wal-Mart is no longer a developing business, but one with a reputation for demanding efficiency and low cost from its suppliers.<sup>143</sup> Wal-Mart has a professed interest in driving the price down for the end user,<sup>144</sup> in contrast to a retailer who might pad margins via resale price maintenance. It would be reasonable to expect Wal-Mart to be hostile to resale price maintenance, potentially to the extent of refusing to carry products under such agreements. While manufacturers are not fond of Wal-Mart's policies, few are willing to give up the major retail channel Wal-Mart represents.<sup>145</sup> Online retailers selling the same products as Wal-Mart and other large discount retailers have reason to be less concerned about resale price maintenance as those discounters exert pressure on manufacturers. This, combined with other marketplace and business efficiency factors, reduces the practical impact of a legal rule more favorable to minimum resale price maintenance.

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<sup>141</sup> See Misha Petrovic & Gary G. Hamilton, *Making Global Markets: Wal-Mart and Its Suppliers*, in *WAL-MART: THE FACE OF TWENTY-FIRST CENTURY CAPITALISM*, *supra* note 10, at 107, 109 (noting observations of a shift in market power from manufacturers to large retailers).

<sup>142</sup> S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small Town America*, 14 ANTITRUST L. & ECON. REV. 81, 82 (1982) (calling resale price maintenance "a great danger to our business" and warning that "when we lose the ability to price our merchandise . . . we've lost the ability to compete").

<sup>143</sup> See Petrovic & Hamilton, *supra* note 141, at 118 (noting Wal-Mart's role in pushing suppliers to use efficient supply chain management); RICHARD VEDDER & WENDELL COX, *THE WAL-MART REVOLUTION: HOW BIG-BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY* 114-15 (2006) (commenting on existence of "plenty of anecdotal evidence confirming that Wal-Mart is very aggressive in demanding low prices from its suppliers").

<sup>144</sup> Wal-Mart Stores: Pricing Philosophy, <http://www.walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=258> (last visited Sept. 28, 2007) (on file with the North Carolina Journal of Law & Technology).

<sup>145</sup> See Chad Terhune, *Coca-Cola Feared Wal-Mart Pressure In Delivery Shift*, WALL ST. J., June 8, 2006, at B6 (explaining that Coca-Cola changed distribution out of fear of Wal-Mart harming the Powerade brand).

#### IV. CONCLUSION

The Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* announced a notable shift in the law of minimum resale price maintenance by implementing a rule of reason standard. In contrast to the former per se rule, the rule of reason stands to allow many minimum resale price maintenance policies to survive legal scrutiny. Retailers that compete for sales based on price, including many online retailers, risk being disadvantaged if their suppliers choose to enact pricing policies. Procompetitive effects identified as permissible, such as preventing free riding on services of a competitor, squarely target a number of online businesses.

While legal barriers to minimum resale price maintenance have been largely removed, practical and economic barriers still remain. Both the history of resale price maintenance and the modern focus on efficiency in supply tend to suggest minimum resale price maintenance will remain a niche business tool without widespread use in the marketplace. Some online merchants will experience difficulty, but many will be able to continue offering bargains and convenience to shoppers around the world. Fears that the *Leegin* decision signals the death of online discounting are premature.

